Religious Treatment Exemption Statutes: Betrayest Thou Me with a Statute?

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RELIGIOUS TREATMENT EXEMPTION STATUTES: *BETRAYEST THOU ME WITH A STATUTE?*[1]

SHIRLEY DARBY HOWELL*

1. *See Luke* 22:48 ("Judas, are you betraying the Son of Man with a kiss?").

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I. Introduction

Matthew, Mark, Luke, and John, bless the bed that I lie on. Before I lay me down to sleep, I give my soul to Christ to keep. Four corners to my bed, four angels there aspread, two to foot, and two to head, and two to carry me when I'm dead. I go by sea, I go by land, the Lord made me by his right hand. If any danger comes to me, Sweet Jesus Christ, deliver me. He's the branch, and I'm the flower, pray God send me a happy hour. And if I die before I wake, I pray that Christ my soul will take.[2]

The words of the ancient English children's prayer take on a particular poignancy whenever a child dies, but never more than when a child dies of an easily treatable illness. Because some parents subscribe to religious beliefs that discourage them from seeking medical treatment for their children, a number of American children die unnecessarily every year. Pediatrician Seth Asser, a respected Rhode Island physician, published a study about children who died after their parents attempted to cure such illnesses as diabetes, meningitis, and bowel obstructions with prayer alone. In commenting on Asser's study one author wrote:

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2. *A Classic Childs Prayer*, Unsolved Mysteries (Sept. 25, 2010, 2:48 PM), http://www.unsolvedmysteries.com/usm532479.html?t=prayers. For a discussion about the history and variations of this Old English prayer, see Evelyn Carington, *A Note on the "White Paternoster,"* 2 Folk-Lore Rec. 127, 127 (1879), *available at* http://www.jstor.org/stable/i253454. The more familiar American version of the prayer is as follows: "Now I lay me down to sleep. I pray the Lord my soul to keep. If I should die before I wake, I pray the Lord my soul to take." *Catholic Spirituality*, Catholic Home, http://catholichome.webs.com/catholicprayers.htm (last visited Mar. 5, 2012).

> [Asser] estimated that one to two dozen American children die each year because their parents neglect to get them medical help, choosing instead to pray for their healing . . . .
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> . . . .
>
> Asser and child advocate Rita Swan worked together on a study of 172 child deaths due to what they called religion-based medical neglect and found that 140 of them would have had a 90 percent chance of survival and [eighteen] others a 50 percent chance of survival with proper medical care. "Most were ordinary illnesses that no one dies from—appendicitis, pneumonia . . . .—and many of them died slow, horrible deaths, without the benefit of (pain-relief) medicine," . . . .[3]

What is distinctly confounding in these tragic situations is how often states seem to aid and abet the parents in the death of the child by affording them specific statutory immunity from prosecution, but then confound the issue by prosecuting the parents nonetheless.

The majority of states now provide either partial or absolute religious statutory immunity for parents who withhold treatment until the child dies. Arkansas's capital-murder statute contains an absolute immunity religious exemption statute:

> (a) A person commits capital murder if: . . .
>
> . . . .
>
> (9)(A) Under circumstances manifesting extreme indifference to the value of human life, the person knowingly causes the death of a person fourteen (14) years of age or younger at the time the murder was committed if the defendant was eighteen (18) years of age or older at the time the murder was committed.
>
> (B) It is an affirmative defense to any prosecution under this subdivision (a)(9) arising from the failure of the parent, guardian, or person standing in loco parentis to provide specified medical or surgical treatment, that the parent, guardian, or person standing in loco parentis relied solely on spiritual treatment through prayer in accordance with the tenets and practices of an established church or religious denomination of which he or she is a member . . . .[4]

In contrast to Arkansas's absolute-immunity statute, Alabama's state law provides only partial immunity. Alabama's statute protects a religious parent from the crime of *endangering* a child, since no harm to the

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3. Bill Sherman, *Faith-based Healing Reviewed: The Death of a Boy Whose Mother Failed to Seek Medical Care Puts Focus on Her Church and Others*, TULSA WORLD (Dec. 31, 2010, 4:54 AM), http://www.tulsaworld.com/specialprojects/news/crimewatch/article.aspx?subjectid=450&articleid=20101231_18_A1_Childn608615.

4. ARK. CODE ANN. § 5-10-10(a)(9) (2006) (emphasis added).

child actually occurred, but grants the parent no immunity for manslaughter or murder.[5] Whether the state grants full or partial religious immunity in these cases, this Article contends that religious exemptions violate public policy for the protection of children as developed at common law and in federal legislation.

This Article asks *why* any state would have religious exemptions that promote the religious practice of withholding medical treatment from dying children. After an analysis of the most probable reasons for the statutes, the Article contends that all such religious exemptions should be repealed as violating public policy. This Article concludes that religious exemption statutes betray the interests of both children and their parents.

Part II sets forth the working definition of *religious exemption* as it is used in this Article. Part III gives an historical overview of the faith-healing traditions in America and the viewpoint of faith-healing parents, and Part IV of this Article expands upon the public policy of protectionism for children at common law and in federal statutes and regulations. Part V of the Article continues by elaborating upon the negative impact religious exemptions have had upon children and their religious parents and explains how the majority of states came to enact religious treatment statutes while asking *why* any state would retain a religious exemption that works against the best interests of children and their parents.

Part VI then goes on to address the First Amendment's limited protections for religious actions, the limited, though fundamental right of parents to the care and control of their minor children, and the reluctance of public officials to prosecute. Lastly, this Article argues for repeal of all religious exemptions. This Article concludes that there is no legal or moral justification for religious exemption statutes that expose children to an unconscionable degree of risk. Further, the Article concludes that it is contrary to principles of due process to maintain laws that send mixed legal signals to religious parents.

II. Religious Exemption Defined

The term "religious exemption" as used in this Article refers to those state statutes that supply limited or absolute immunity from prosecution to parents who refuse to obtain medical treatment for their children for religious reasons.

Religious or spiritual exemptions such as the one set out in the Introduction are strictly creatures of the various states. There is no federal analog to such exemptions. These exemptions protect religious parents who withhold medical care from their children even at the risk of the

5. Ala. Code § 13A-13-6(b) (LexisNexis 2011).

child's death. These statutes provide immunity ranging from an exemption for capital murder to lesser protections such as a religious defense to child endangerment, criminal abuse or neglect, and cruelty to children.[6]

Alabama's statute is illustrative of these lesser protection statutes:

> (a) A man or woman commits the crime of endangering the welfare of a child when:
>
> . . . .
>
> (2) He or she, as a parent, guardian or other person legally charged with the care or custody of a child less than 18 years of age, fails to exercise reasonable diligence in the control of such child to prevent him or her from becoming a "dependent child" or a "delinquent child". . . .
>
> (b) A person does not commit an offense under Section 13A-13-4 or this section for the sole reason he provides a child under the age of 19 years or a dependent spouse with remedial treatment by spiritual means alone in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof in lieu of medical treatment.[7]

These statutes in every instance protect the sincerity of adult religious conviction at the cost of the interest of the child in his own health and his life. Religious exemptions, by their very nature, consistently elevate the

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6. *Id*.; DEL. CODE ANN. tit. 11, § 1104 (2007); GA. CODE ANN. § 15-11-2(8) (2008); IDAHO CODE ANN. § 18-1501(4) (2004); IND. CODE ANN. § 35-46-1-4(4)(a)(4) (LexisNexis 2009); IOWA CODE § 726.6(d) (2011); KAN. STAT. ANN. § 21-3608(b) (2007); LA. REV. STAT. ANN. § 14:93(b) (2004); ME. REV. STAT. ANN. tit. 17-A, § 557 (2006); Minn. Stat. Ann. § 609.378(1) (West 2009); MO. STAT. ANN. § 568.050(4)(2) (West 1999); NEV. REV. STAT. § 200.5085 (2009); N.H. REV. STAT. ANN. § 639:3(IV) (LexisNexis 2007); OHIO REV. CODE ANN. § 2919.22(A) (LexisNexis 2010); OKLA. STAT. ANN. tit. 21, § 852.1 (West 2002); OR. REV. STAT. §§ 163.206(4), 163.555 (2011); S.C. CODE ANN. § 20-7-490(3)(c) (1985); TENN. CODE ANN. § 37-1-157(c) (2010); TEX. PENAL CODE ANN. § 22.04(k)(2) (West 2011); UTAH CODE ANN. § 76-5-110(3)(a) (2008); VA. CODE ANN. § 18.2-371.1(c) (2011); W. VA. CODE ANN. § 61-8D-4(a)(b) (LexisNexis 2010); WIS. STAT. ANN. § 948.03(6) (West 2005). Other states provide a religious exemption through an absolute defense to any crime upon a showing by the defendant that his or her actions or inaction was motivated by his or her religious beliefs. *E.g.,* ARK. CODE ANN. § 5-10-101(a)(9) (2006); CAL. PENAL CODE § 270 (West 2008) (In *Walker v. Superior Court*, 763 P.2d 852 (Cal. 1988), the California Supreme Court concluded that CAL. PENAL CODE § 270 (West 2008) provided an absolute defense to the misdemeanor of nonsupport); DEL. CODE ANN. tit. 11, § 1104 (2007); LA. REV. STAT. ANN. § 14:93(b) (2004); N.H. REV. STAT. ANN. § 639:3(IV) (LexisNexis 2007); N.Y. PENAL LAW § 260.15(b) (McKinney 2000); OR. REV. STAT. §§ 163.115(4), 163.118(1)(c)(B), 163.206(4), 163.555(2) (2011); TEX. PENAL CODE ANN. § 22.04(k)(2) (West 2011); W. VA. CODE ANN. § 61-8D-4(a)(b) (LexisNexis 2010). For a detailed list of state statues see *infra* Appendix.

7. ALA. CODE § 13A-13-6(b).

religious interests of the dominant parental party above the welfare of the subservient child.

III. An Overview of Faith Healing Traditions in America and the Perspective of Faith Healing Parents

A. *Faith Healing Traditions in America*

In order to understand the power of faith healing tradition in the lives of some parents, one must have a rudimentary knowledge of the history of faith healing. A brief representative history is set out below.

Faith healing traditions have always been and remain part and parcel of the American story. In the United States, three religious traditions dominate: Christianity, Judaism, and Islam.[8] Each of the traditions have stories of miraculous interventions by a divine, all powerful Other.[9] Faith healing as a central tenet of belief, however, is almost an exclusively Christian phenomenon. The Christian focus on physical healing began with the practices of Jesus. The Christian gospels report that Jesus healed lepers,[10] the blind,[11] and the lame.[12] There are also reports that Jesus cured people who were mentally ill,[13] and he actually raised people from

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8. According to the U.S. Census Bureau, as of 2000 there were approximately 133,377,000 Christian church adherents. U.S. Census Bureau, Statistical Abstract of the United States: 2012 tbl. 77 (n.d.), *available at* http://www.census.gov/compendia/statab/2012/tables/12s0077.pdf. In 2010, there were approximately 6,544,000 Jews in America. *Id.* The estimated number of Muslims in the United States in 2010 is 2.6 million. *The Future of the Global Muslim Population*, Pew Forum on Religion & Pub. Life (Jan. 27, 2011), http://www.pewforum.org/The-Future-of-the-Global-Muslim-Population.aspx.

9. *See* Ya'akov Gerlitz, *Jewish Healing Prayer or Energy Healing*, Jewish Healing Practices, http://jewishhealing.com/jewishprayerhealing.html (last visited Apr. 19, 2012) ("[B]y performing energy healing through prayer, you become energized rather than becoming depleted. Not only do you become energized and receive your own healing energy, you also, by the merit of being Hashem's messenger, receive a Divine influx to help your patient.").

10. *Luke* 17:11–14. Ten lepers cried out to Jesus, "Jesus, Master, have mercy on us!" and Jesus healed them all. *Id.*

11. *Luke* 18:35–42. A blind man was sitting beside the road to Jericho. *Id.* When he saw Jesus he asked him to restore his sight. *Id.* Jesus restored the man's sight saying, "Receive thy sight: thy faith hath saved thee." *Id.* at 18:42.

12. *Luke* 13:10–13. Jesus saw a woman who had been crippled for eighteen years. *Id.* Spontaneously, Jesus called to her, telling her, "Woman, thou art loosed from thine infirmity," and Jesus placed his hands upon her and she was healed. *Id.*

13. *Luke* 9:37–43. A father implored Jesus to heal his only son. *Id.* The father reported that his son was possessed by a "spirit" that caused him to scream and foam at the mouth. *Id.* Jesus rebuked "the evil spirit" and healed the boy. *Id. See also Luke* 8:26–38. Jesus came upon a man who was naked, homeless and possessed "by demons." *Id.* After Jesus healed the man, townsmen found the man "in his right mind." *Id.*

the dead.[14] The Biblical epistles indicate that those closest to Jesus were able to continue to heal physical ailments after Jesus was executed.[15] One church scholar argues that "Christianity survived and succeeded at least partly because of its reputation for performances of healing."[16]

The early Christian church perpetuated the belief in spiritual healing, often employing elaborate healing incantations and rituals.[17] Priests administered unction for healing to the faithful until Augustine concluded that the Church should no longer concern itself with matters of physical healing.[18] Unction for healing became a holy sacrament for the dying.[19]

The Protestant Reformation ushered in a radically different view of faith healing. The French theologian John Calvin openly denounced the notion that bodily healing was the province of the church, stating: "The grace of healing has disappeared and has nothing to do with us."[20] The mainline Protestant denominations eventually adopted the Calvinistic position, and belief in faith healing declined steeply in Europe during the Reformation.[21]

It was on the fledgling American frontier that faith healing caught a second wind of popularity. French explorer Jacques Cartier conducted

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14. *Luke* 7:11–15. A funeral for a widow's only son was in progress when Jesus entered the city. *Id.* Jesus commanded the dead son to get up. *Id.* When the life of the widow's son had been restored, Jesus gave him back to her. *Id.* In Luke 9:49–56, Jesus raised Jairus' daughter from the dead by taking her hand and stating, "My child, get up!" *Id.* In John 11:1–45, the apostle reports that Jesus called Lazarus from the tomb. *John* 11:1–45. Though Lazarus had been dead four days, Lazarus obeyed Jesus' command to "come out." *Id.*

15. *Matthew* 10:1. Jesus gave his twelve disciples the "power [against] unclean spirits, to cast them out, and to heal all manner of sickness and all manner of disease." *Id.* In Acts 3:2–8, Peter healed a man who had been crippled from birth after Jesus had died. *Acts* 3:2–8. See also Acts 5:12–16, which states that numerous sick people were healed when Peter's shadow fell upon them.

16. Amanda Porterfield, *Healing in the History of Christianity: Presidential Address*, *January 2002*, *Am. Society of Church History*, 72 CHURCH HIST. 227-242 (2002), *available at* http://findarticles.com/p/articles/mi_hb050/is_2_71/ai_n28931565/.

17. SHAWN FRANCIS PETERS, WHEN PRAYER FAILS: FAITH HEALING, CHILDREN, AND THE LAW 31 (2008). "However, these . . . trends did not displace prayer and sacramental anointing as methods of healing . . . ." *Id.*

18. MORTON T. KELSEY, HEALING AND CHRISTIANITY IN ANCIENT THOUGHT AND MODERN THOUGHT 184–85 (1973).

19. *Extreme Unction,* NEWADVENT.ORG, http://www.newadvent.org/cathen/05716a.htm (last visited Apr. 19, 2012).

20. PORTERFIELD, *supra* note 16, at 233.

21. Peters, *supra* note 17. "Protestant reformers viewed healing somewhat differently. Appalled by excesses of the medieval church, they frowned upon the magical elements of some healing rituals. Reformers recognized the importance of miraculous healing the early church, but they believed that it essentially had ceased after the apostolic age." *Id.*

healing ceremonies for Native Americans.[22] Itinerant ministers such as George Fox claimed to heal bodily illness in the name of Jesus.[23] By the end of the Civil War, faith healers such as Maria Woodworth-Etter[24] and itinerant ministers such as George Fox, claimed to heal bodily illness in the name of Jesus; others, such as Charles Cullis, and Albert Simpson captured the imagination of thousands with their traveling tent revivals and flamboyant faith-healing sessions.[25]

In 1875, Mary Baker Eddy ushered in a radically different approach to faith healing.[26] In her first book, *Science and Health*,[27] she proclaimed that illness was a non-entity, a "dream" from which the Christian Science healer is to help the patient awake from with prayer emphasizing "Truth" and "Love."[28] Not dissimilar to the faith healers that had gone before

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22. RICHARD WIGHTMAN FOX, JESUS IN AMERICA: PERSONAL SAVIOR, CULTURAL HERO, NATIONAL OBSESSION 39 (2004); s*ee* PETERS, *supra* note 17, at 32 (explaining how Jacque Cartier and his Spanish contemporary Alvar Nunez Cabeza de Vaca claimed that they were "besieged" by Native Americans looking to be healed, which is ironic given that the Europeans were responsible for the diseases that necessitated the healing ceremonies in the first place).

23. PETERS, *supra* note 17, at 32. In Describing one healing Fox wrote:

> [I] took him by the hair of the head, and his head turned like a cloth it was so loose, and I threw away my stick and gloves and took his head in both my hands, and set my knees against the tree; and raised his head and I did perceive it was not broken out that way, and I put my hand under his chin, and behind his head, and raised his head [two] or [three] times with all my strength and brought it in, and I did perceive that his neck began to be stiff, and then he began to rattle, and after to breathe, and the people were all amazed.

Id. (citing GEORGE FOX, THE JOURNAL OF GEORGE FOX vol. II 227, 234 (1911)).

24. *Id.* at 33. "Attendees wailed and writhed as Woodworth-Etter helped the Holy Spirit to drive out the demons causing their illnesses, thereby restoring their health." *Id.*

25. *Id.* at 33. Following the aftermath of the Civil War, many Christians turned to their Church for solace, and the late 19th century and into the beginning of the 20th century the United States saw a rise in Holiness and Pentecostal movements. *Id.* Some in this movement came to view traditional medicine as going against the teachings of the scriptures and argued that true Christians should exclusively rely on prayer for healing. *Id.* Grant Wacker, a prominent scholar on the history and practice of the Pentecostal movement noted that during this time period, "th[e] rejection [of the practice of medicine] fit into a broader pattern of 'renunciative behavior' found among many evangelical Protestants. Some Pentecostals turned their backs on medicine in much the same way that they abandoned such other purportedly sinful practices as dancing, drinking, and smoking." *Id.*

26. *See,* MARY BAKER EDDY, SCIENCE AND HEALTH WITH KEYS TO THE SCRIPTURES (reprt. 1994). In describing Mary Maker Eddy the publisher states that as, [t]he daughter of staunch New England Calvinist parents, she protested against the idea that pain and suffering are God's will. She knew intuitively that God's will was only good, and she turned to the Bible for answers. The insights she gained from her Bible study replaced hopelessness with hope, and fear with love." *Id.*

27. *Id.*

28. *Id.* at 417. Addressing Christian Science Healers, Mary Baker Eddy instructs to "[m]aintain the facts of Christian Science,—that Spirit is God, and therefore cannot be

her, Eddy declared that "[t]he procuring cause and foundation of all sickness is fear, ignorance, or sin."[29] However, Eddy eschewed the sometimes raucous, dramatic tent revivals that were hallmarks of her contemporaries and she did not claim that she or any of her faith's healers could relieve medical issues by their own ability to channel Jesus; instead, she urged a program of guiding the sick towards healing themselves through their faith.[30] She ordered Christian Scientist healers to "[i]nstruct the sick that they are not helpless victims, for if they will only accept Truth, they can resist disease and ward it off, as positively as they can the temptation of sin."[31] This is not, however, how she viewed the healing of children. In regards to a sick child, Eddy admonished parents who treated their young children or infants with drugs and urged that a child's "needs [were] to be met mainly through the parent's *thought*."[32] She completely disregarded the existence of hereditary diseases.[33]

In 1879, Eddy established Christian Science as a formally acknowledged religion within the United States.[34] The Church has remained relatively small compared to other recognized religions, with only about 400,000 members worldwide.[35] Currently, the church has a powerful lobby that has worked both on the state and federal levels to obtain benefits for its followers. As a result of concerted lobbying, Christian Scientists now have sanatoria available to them where they can receive nonmedical attention and assistance[36] that is covered by both Medicare and Medicaid reimbursements.[37] While the Christian Scientists are not the

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sick; that what is termed matter cannot be sick; that all causation is Mind, acting through spiritual law." *Id.*

29. *Id.* at 411.

30. *Id.* at 420.

31. BAKER EDDY, *supra* note 26, at 420.

32. *Id.* at 412 (emphasis added).

33. *Id.*

34. Anne D. Ledermann, *Understanding Faith: When Religious Parents Decline Conventional Medical Treatment for Their Children,* 45 CASE W. RES. 891, 926 n.1 (1995).

35. *Church of Christ, Scientist (a.k.a. Christian Science)*, RELIGION FACTS, *available at* http://www.religionfacts.com/a-z-religion-index/christian_science.htm (last accessed Apr. 19, 2012). There are active Christian Scientist groups in over seventy countries. *Global Membership,* CHRISTIAN SCIENCE, http://christianscience.com/church-of-christ-scientist/about-the-church-of-christ-scientist/global-membership (last visited Apr. 17, 2012).

36. *See* Brief Amicus Curiae of the Am. Acad. of Pediatrics et al., in Support of Petitioners, Children's Healthcare Is a Legal Duty, Inc. v. Dir. of Health Care Fin. Admin., 532 U.S. 957 (2001) (No. 00-0914), 2001 WL 34117650. (The AAP urged the court to grant certiorari to consider whether Medicaid or Medicare reimbursements to the sanatoria constitute a state sponsorship of a particular religious belief.).

37. *Id.*

only Christian denomination to practice faith healing, it is by far the most politically powerful.

The other denominations that predicate faith itself upon a willingness to trust in faith healing alone tend to be small congregations loosely affiliated with a form of Pentecostalism.[38] In 1901, the Pentecostal movement in America was started by Charles Parham.[39] Parham preached a charismatic gospel that included physical healing as a sign of the presence of the Holy Spirit.[40] While the practices differ from congregation to congregation, all Pentecostals believe in the power of prayer to bring about healing. Congregations such as the General Assembly and Church of the First Born,[41] Faith Assembly Church,[42] the Faith Tabernacle Church,[43] and the No-Name Fellowship Church,[44] however, believe that resorting to medical care shows a lack of faith. Therefore, congregants only practice methods of spiritual healing for the purpose of curing sickness.[45] While these small Pentecostal groups tend to be reclusive[46] and lack the political clout of the Church of Christ, Scientist, they have at times escaped prosecution because of legislation sponsored by Christian Scientists.[47]

B. *The Prototypical Faith Healing Parent*

Adherents of faith healing hold beliefs that are likely foreign to the majority of religious parents in America. Such a faith healing parent, particularly if a Christian Scientist practitioner, believes that a child's ill-

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38. Phil Anderson, *Revolution began on Topeka Street*, TOPEKA CAP. J. (Kan.), April 8, 2006, http://cjonline.com/stories/040806/rel_anderson.shtml.

39. *History of the Pentecostal Movement*, CHRISTIAN ASSEMBLIES INT'L, http://www.cai.org/bible-studies/history-pentecostal-movement (last visited Apr. 19, 2012).

40. *Id.*

41. *In re* D.L.E. 645 P.2d 271, 272 (Colo. 1982) (en banc).

42. Wayne F. Malecha, *Faith Healing Exemptions to Child Protection Laws: Keeping the Faith Versus Medical Care for Children*, 12 J. LEGIS. 243, 244-46 (1985).

43. *Statement of Faith,* FAITH TABERNACLE CHURCH, http://www.faithwired.com (last visited Apr. 19, 2012) (Amongst the church's beliefs is faith "[i]n divine healing for the body through faith in the name of Jesus and that this is part of atonement").

44. *See* State v. Norman, 808 P.2d 1159 (Wash. Ct. App. 1991) (discussing the practices of the No-Name Fellowship Church).

45. *Id.* at 1160.

46. *Faith-Healing Oregon Parents Acquitted of Manslaughter*, TAMPA BAY ONLINE, http://www2.tbo.com/news/breaking-news/2009/jul/23/faith-healing-oregon-parents-acquitted-manslaughte-ar-93903/ (last visited Apr. 19, 2012).

47. Will McCahill, *Christian Scientists Want Health Bill to Include Prayer: Provision's Been Stripped from Both House, Senate Versions*, NEWSER (Dec. 20, 2009 5:10 AM), http://www.newser.com/story/76546/christian-scientists-want-health-bill-to-include-prayer.html.

ness is not real, but rather a serious spiritual distortion.[48] The parent also believes that medical treatment will compromise the child's spiritual journey,[49] and he acts in his child's eternal best interests by *protecting* the child from medical treatment.[50] He seeks to attain "Truth."[51]

Believers of faith healing love their children, and they do what they believe is best for them.[52] They want their children to be cured, and they pray with great intensity for that result.[53] These parents do everything other parents would do for their sick children except seek medical assistance.[54]

Despite their powerful beliefs regarding medicine, faith-healing adherents grieve the loss of their children.[55] Doctor Seth Asser, a long-time vocal proponent of repealing all religious exemptions for child-neglect cases, visited a county cemetery in Oregon where small headstones marked children's graves.[56] Asser himself was moved to state: "What struck me was the fact that it was obvious from the expressions on the headstones *that the children were loved*."[57]

It is evident that these parents are neither indifferent nor lacking in human passion for the welfare of their children. From the perspective of sincere faith-healing parents, their actions are noble and in submission to God, taken with utmost good faith, and in their child's spiritual best interest. The only bona fide question is whether any state should exempt these parents from responsibility for the preventable impairments and deaths of their children.

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48. Edward Egan Smith, Note, *The Criminalization of Belief: When Free Exercise Isn't*, 42 HASTINGS L.J. 1491, 1491 n.3 (1991).

49. BAKER EDDY, *supra* note 26, at 157.

50. *Id.* at 417. "To the Christian Science healer, sickness is a dream from which the patient needs to be awakened." *Id.*

51. *Id.* at 420. "[For] Truth destroys disease." *Id.*

52. *What is Christian Science?*, CHRISTIAN SCIENCE, http://christianscience.com/what-is-christian-science#caring-for-children (last visited Apr. 19, 2012).

53. *Id.*

54. *See id.* (asserting that "[p]rotecting children's lives and promoting their health and well being is a standard parents should all be held to no matter what means of health care they choose").

55. *Child Deaths Test Faith-Healing Exemptions: Three Criminal Cases Revive Concern over Parents Who Avoid Doctors*, MSNBC (Nov. 21, 2008, 3:05:27 PM), http://www.msnbc.msn.com/id/27844314.childdeathstestfaith-healingexemptions.

56. *Id.* (recognizing Dr. Asser for his detailed study that addressed the easily preventable deaths for most of the children).

57. *Id.* (emphasis added).

IV. Public Policy Protectionism for Children

Faith healing parents lose children every year to treatable diseases, and they often are exempt from prosecution for behavior that would constitute medical neglect if done by a parent who did not believe in faith healing.[58] The religious exemptions that provide protection for the parent at the expense of the child represent a perplexing aberration in an otherwise seamless public policy favoring protectionism towards children. Both common law doctrine and federal statutory law provide multiple means by which the law protects children from themselves and from the adults who might take advantage of them. The early common law doctrine of parens patriae[59] empowered the state to protect and care for dependent children and their best interests. The state could—and did—intervene on behalf of the welfare and safety of "infants, lunatics, and idiots . . . ."[60] Each state currently has its own set of statutory child protection statutes which allow the state to intervene when a parent is neglecting or abusing his child. In the federal arena, Congress has enacted legislation to promote the welfare of children. Examples of common law protections for minor children are set out below in Part IV(A). Examples of federal statutes enacted to protect minor children are set out in Part IX(B) below.

A. *Common Law Doctrinal Protections for Children*

The common law recognized early on that minor children required protection from their own immaturity and from the neglect or overreaching by adults. Below is a brief summary of how common law doctrines in contract, tort, and criminal law were adapted to protect minors, even at the expense of adult rights, if necessary.

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58. *See, e.g.*, 42 U.S.C. §§ 5101–5105 (2006); *Williams v. Coleman*, 488 N.W.2d 464, 468 (Mich. Ct. App. 1992); *State v. Williquette*, 385 N.W.2d 145, 150 (Wis. 1986). *See also In re* Hauserman, Nos. 77235 & 77252, 2002 WL 451293, at *3 (Ohio Ct. App. Mar. 11, 2002) (finding no criminal neglect against parents for not refilling their son's asthma medicine); *Child Deaths Test Faith-Healing Exemptions: Three Criminal Cases Revive Concern Over Parents Who Avoid Doctors*, *supra* note 55 (addressing a number of state statutes that grant an exemption for faith-healing parents in child neglect cases); *Faith-Healing Oregon Parents Acquitted of Manslaughter*, *supra* note 46 (discussing the acquittal of Followers of Christ, Carl and Raylene Worthington for the death of their fifteen month old daughter).

59. *State of W. Va. v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1089 (2d Cir. 1971). Parens patriae is "the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents. Black's Law Dictionary 1114 (6th ed. 1990). It is a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people. *Id.*

60. Natalie Loder Clark, *Parens Patriae and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children's Welfare*, 6 Mich. J. Gender L. 381 (2000) (citing 2 Sir Frederick Pollack & Frederick William Maitland, The History of English Law 445 (2d ed. 1968)).

1. Contracts

Common law generally provides that if a minor enters into a contract with an adult, the minor can void the contract, regardless of the hardship or severity of loss to the adult party.[61] On the other hand, the adult party possesses no right to void the contract if the child prefers that the contract remain in force.[62] The public policy underlying this protective doctrine rests upon the principle that adult parties to a contract can and will protect their interests. Children, however, do not have the capacity to protect their interests as their youth and susceptibility to adult persuasion hinder them from doing so.[63] Thus, when a child's right to legal protection conflicts with an adult's right to enforce his contracts, the child's legal rights are deemed superior. No religious exception to the rule exists. If the adult had a religious purpose for contracting with a minor, the law of contract would still protect the interest of the minor in voiding the contract. The religion of the adult would be irrelevant if enforcement of the contract would harm the child. The following hypothetical illustrates this point.

Suppose that a devout Orthodox Rabbi is in urgent need of a menorah for an impending religious celebration. The only menorah the Rabbi finds suitable to the occasion belongs to a fourteen year old atheist of dubious aesthetic sensibilities. The Rabbi offers Boy $300 for the menorah. Boy accepts. The next day Boy learned that he could obtain $500 for the menorah from a scrap metal dealer. Common law permits Boy to rescind his contract, thereby frustrating Rabbi's religious needs. The common law of contracts is more sympathetic to Boy's best interests than to the Rabbi's religious practices.

2. Torts

The law of torts follows a similar path to that of contracts in providing protections for children. Early common law developed the rigid "reasonable prudent person" standard for judging whether an adult's conduct was negligent.[64] For adults, the law does not accept as a defense that the adult defendant did what he thought best, if the hypothetical reasonable,

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61. E. ALLAN FARNSWORTH, COMMON LAW COURTS VIEWED THE CONTRACTS OF A MINOR AS VOIDABLE AT THE ELECTION OF THE MINOR CONTRACTS 222, (4th ed. 2004).

62. *Id.*

63. *Id.; see* JOEL TIFFANY, REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF APPEALS OF THE STATE OF NEW YORK 536 (1866) (the court refers to the "[p]rotracted struggle . . . to protect infants or minors from their own improvidence and folly, and to save them from the depredations and frauds practiced upon them by the designing and unprincipled").

64. RESTATEMENT (SECOND) OF TORTS §§ 1-280 (1965).

prudent person would have done differently.[65] When the defendant is a child, however, the standard is kinder, more subjective. Common law judged the child's conduct against what would be reasonable to expect of a child "of like age, intelligence, and maturity."[66] The child's personal immaturity *is* to be considered, whereas the immaturity of an adult is irrelevant. The lesser standard again demonstrates a societal concern for children and an acknowledgement that children do not possess the same capacity to recognize dangerous situations as an adult would.[67] As a society, we do not prefer to see a minor's future ruined by tort judgments before he is old enough to understand the inadvisability of his actions.

To illustrate the point, again with a religious reference, suppose a child of three accidentally burns down his entire church facility, resulting in a multi-million dollar property loss and the church's inability to support missionary work. The child will escape liability for his act because society understands his immaturity and chooses to protect him. The members of the congregation may never find another place of worship that they like so well. Some congregants may suffer extreme mental distress due to the child's actions. Nonetheless, the religious distress of adults cannot trump the law's protection for the innocent child.

Common law also protects children in a different negligence scenario. Tort law is infamous for not imposing a generalized duty to attempt the rescue of those in harm's way.[68] The proverbial trained swimmer may sit idly by while he watches another person drown. However, modern tort law deviates from the general rule to state that a *parent* may not sit idly by and watch his own child drown. The parent must make a "reasonable" attempt to rescue his child. The special relationship between the parent

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65. "The standard which the community demands must be an external one, rather than that of the individual judgment, good or bad, of the particular individual." *Id.* at § 283.

66. *Id.* at § 283A ("If the actor is a child, the standard of conduct to which he must conform is that of a reasonable person of like age, intelligence, and experience under like circumstances.").

67. DeLuca v. Bowden, 329 N.E.2d 109, 111 (1975).

> [C]hildren of tender years, gradually acquire the capacity to understand and appreciate the consequences of their acts as they acquire age and experience. Only with some maturity does a child begin to realize that his choice of acts may injure himself or others, and only then can it be said that he possesses the capacity to act "reasonably."

Id.

68. RESTATEMENT (SECOND) OF TORTS § 314 ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose on him a duty to take such action.").

and his child gives rise to the specific duty imposed upon the parent,[69] and states may elect to terminate the parental rights of a parent who fails to protect their child from known danger.[70] This common law duty to take reasonable actions to protect one's own children from danger is particularly important for purposes of this Article and will be addressed in Section V below.

3. Criminal Law

The parens patriae doctrine of protectionism for minor children has shaped our modern juvenile system. When a juvenile commits an act that would be adjudged to be criminal if committed by an adult, the child goes to a juvenile facility, not the police station.[71] All subsequent proceedings are taken with a view towards rehabilitating the child and providing for his safety and best interests.[72] The child's record is sealed to protect their future prospects.[73] If the child is successfully chastened by his experience with the juvenile authorities, he enters adulthood without the liability of a criminal record. For example, if a fourteen-year-old steals his neighbor's costly crucifix and maliciously destroys it, the juvenile system will still view the child's best interest as paramount to the victimized adult's right to seek retributive justice.[74]

In the last decade alone the United States Supreme Court granted certiorari review in two cases involving protections for minors. In both cases the Supreme Court limited the severity of punishments that the states may mete out to minors convicted of serious crimes. In 2005, the Supreme Court issued its landmark decision in *Roper v. Simmons*,[75] holding

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69. *Id.* The only special relationships recognized at early common law were common carriers and their passenger, innkeepers and their guests, and one who takes another into custody and thereby deprives him of normal opportunities for protection. *Id.*

70. *See In re* T.G., 578 N.W.2d 921, 923 (S.D. 1998) (terminating mother's parental rights for failure to protect her minor children from the wrongful sexual conduct of their stepfather).

71. 42 U.S.C. § 5633 (a)(13) (2006).

72. DOUGLAS E. ABRAMS AND SARAH H. RAMSEY, CHILDREN AND THE LAW 978 (4th ed. 2010).

73. 42 U.S.C. § 5676 (2006).

74. The juvenile court is to determine more than the mere guilt or innocence of a child; it is "to take him in charge, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen." Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

75. 543 U.S. 551 (2005). The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." Thompson v. Oklahoma, 487 U.S. 815, 835 (1988). Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. *See* Stanford v. Kentucky, 492 U.S. 361, 395 (1989) (Brennan, J., dis-

that no state may execute a person for a murder he committed while below the age of eighteen, however aggravated, shocking, or grisly the crime. The facts in *Roper* could scarcely have been more grisly:

> Simmons [age seventeen] and Benjamin entered the home of the victim, Shirley Crook, after reaching through an open window and unlocking the back door. Simmons turned on a hallway light. Awakened, Mrs. Crook called out, "Who's there?" In response Simmons entered Mrs. Crook's bedroom, where he recognized her from a previous car accident involving them both. Simmons later admitted this confirmed his resolve to murder her.
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> Using duct tape to cover her eyes and mouth and bind her hands, the two perpetrators put Mrs. Crook in her minivan and drove to a state park. They reinforced the bindings, covered her head with a towel, and walked her to a railroad trestle spanning the Meramec River. There they tied her hands and feet together with electrical wire, wrapped her whole face in duct tape and threw her from the bridge, drowning her in the waters below.[76]

Simmons, in a particularly heinous comment, stated that he killed Crook, "because the bitch seen my face."[77] Notwithstanding Simmons' depraved conduct, the Supreme Court acted to *protect his life* because of his youth.[78] The Court inter alia cited the "vulnerability and comparative

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senting) (recognizing that juveniles are not as mature as adults, and accordingly should not be given the same level of responsibility as adults). The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, "relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." Johnson v. Texas, 509 U.S. 350, 368 (1993).

76. Roper v. Simmons, 543 U.S. 551, 556–57 (2005).

77. *Id.* at 557.

78. *Id.* at 571. The Court identified three differences between adults and minors:

> These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to irresponsible and immature behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult. Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.

lack of control over their immediate surroundings"[79] that characterizes youth as reason enough to spare minors from the death chamber.[80]

In *Graham v. Florida*,[81] the Supreme Court again expanded protection for minors. The Court ruled that no state may sentence a minor to life imprisonment for any crime or series of crimes that do not involve homicide.[82] The Court issued a categorical rule giving "all juvenile nonhomicide offenders a chance to demonstrate maturity and reform."[83] Justice Kennedy's majority opinion further declared, "[t]he juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential."[84] Furthermore, several decades ago, the Supreme Court established that while all inmates (which would include juveniles) are serving their sentences, they still enjoy a constitutional right to adequate medical treatment.[85]

The *Roper* and *Graham* decisions leave no doubt about America's intent to protect its youth, even the most dangerous and violent juveniles. It is, then, worse than incongruous that many of our states provide an absolute safe harbor for adults who withhold adequate medical treatment from innocent children—children who will die long before they can enjoy "the opportunity to achieve maturity of judgment and self-recognition of human worth and potential."[86]

Id. at 570.

79. *Id.*

80. *Id.* at 570–71. "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpabilities or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Id.* at 571.

81. 560 U.S. __, 130 S. Ct. 2011 (2010) (holding that minors cannot receive a life sentence for a nonhomicide offense).

82. Graham v. Florida, 560 U.S. __, 130 S. Ct. 2011, 2030 (2010). "In sum, penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders. This determination; the limited culpability of juvenile nonhomicide offenders; and the severity of life without parole sentences all lead to the conclusion that the sentencing practice under consideration is cruel and unusual." *Id.* For insight into the realities of the juvenile justice system and analysis of *Roper, and Graham*, see Sarah Jane Forman, *Countering Criminalization: Toward a Youth Development Approach to School Searches,* 14 SCHOLAR 301, 348–57 (2011).

83. *Id.* at 2032.

84. *Id.*

85. Estelle v. Gamble, 429 U.S. 97, 104 (1976). "We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment." *Id.* (citation omitted). *See also* Fountain v. State, 648 So.2d. 591, 592 (Ala. Civ. App. 1994) (applying the *Estelle* holding on adequate medical treatment to Alabama).

86. *Graham*, 560 U.S. __, 130 S. Ct. at 2032.

B. *Federal Acts for the Protection of Children*

Just as common law doctrines sometimes impose hardship on adults to protect children, numerous federal acts do the same. Congress makes liberal use of its spending power to benefit children and protect them from adults. Some of these acts are set out below to illustrate the strong federal policy favoring protection of children.

The Juvenile and Delinquency Prevention Acts of 1974 and 1980 mandates, inter alia, that no juvenile be detained or confined in an institution wherein they may have contact with adult inmates.[87] One goal of the Act and its amendments is to seek to protect children from the influences of adult criminals and the prison culture.[88]

Congress has enacted legislation to protect minor children from the ill effects of cigarette smoking. Because of data indicating that adolescents face enhanced health risks from smoking that include "cough and phlegm production, an increased number and severity of respiratory illnesses, decreased physical fitness, an unfavorable lipid profile, and potential retardation in the rate of lung growth and the level of maximum lung function,"[89] laws were enacted to prohibit the sale and distribution of tobacco products to minors.[90] Non-complying states lose federal block grant funds for substance abuse prevention and treatment.[91]

Several national epidemiologic studies have indicated that underage drinking is common and that a significant minority of underage youths are heavy, episodic drinkers.[92] As a result of such findings, Congress enacted the Uniform Drinking Age Act,[93] prohibiting the purchase or public possession of alcoholic beverages by persons under twenty-one years of age. A state refusing to enact such statutes would lose federal funding for their highways.[94] Congress used its spending power to influence the states to act in protection of their children's health and welfare.[95] Another action enacted by Congress is codified at 23 U.S.C. Section 153, in

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87. 42 U.S.C. §§ 5601–5792 (2006). "[J]uveniles alleged to be or found to be delinquent . . . will not be detained or confined in any institution in which they have contact with adult inmates . . . ." *Id.* § 5633(a)(12)(A).

88. *Id.*

89. U.S. DEPT. OF HHS, PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT OF THE ATTORNEY GENERAL 8 (1994). This report goes on to discuss the impacts of smoking cigarettes on adolescents. *Id.* at 6–9.

90. 42 U.S.C. § 300x-26 (b)(1) (2006).

91. *Id.*

92. *Underage Drinking: A Major Public Health Challenge* NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM (Apr. 2003), http://pubs.niaaa.nih.gov/publications/aa59.htm.

93. 23 U.S.C. § 158 (2006).

94. *Id.*

95. South Dakota v. Dole, 483 U.S. 203, 206 (1987).

this statute Congress mandated that small children be secured in a child restraint system. Failure to enact such a requirement would cause the state to lose highway funding.[96]

There are many other federal regulations for the protection of the nation's children. For example, 18 U.S.C. Section 922 prohibits a person under eighteen from knowingly possessing handguns, or ammunition suitable only for handguns.[97] This statute also prohibits persons from selling or otherwise transferring these weapons or ammunition to someone they know or have reasonable cause to believe is under eighteen.[98] In addition, 29 U.S.C. Section 218(a) regulates child labor and protects children from adults who seek to exploit them.[99]

Since there can be no doubt that public policy of the common law, the state, and Congress all favor protectionism for children, one must question the reason for *any* state statute that abandons strong public policy in favor of granting protection to an adult. Religious exemption statutes, as the term is used in this Article, appear to do just that.

V. Negative Effects of Religious Exemptions for Both Children and Their Parents

A. *Illustrative Cases*

No one on either side of the controversy involving religious exemptions seriously disputes that many children have died torturous deaths when their parents withheld medical treatment. I argue below that the existence of immunity statutes is causally related to those deaths. Furthermore, that the protection from prosecution and civil liability that religious exemptions promise to parents has proven illusory, leaving many parents embroiled in criminal prosecutions and civil litigation for years after the death of their child. A few representative cases clearly illustrate the effects of these statutes.

One of the most egregious cases occurred in 1956 and concerns the untimely death of seven year old David Cornelius, the son of Christian Scientists.[100] Though David's parents opposed medical treatment for

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96. Frederick P. Rivara & David C. Grossman, *Prevention of Traumatic Deaths to Children in the United States: How Far Have We Come and Where Do We Need to Go*?, 97 Pediatrics 791–92 (1996).

97. 18 U.S.C. § 922 (2006).

98. *Id.*

99. 29 U.S.C. § 218(a) (2006). *See also* United States v. Darby, 312 U.S. 100, 126 (1941) (upholding the constitutionality of the Fair Labor Standards Act of 1938, codified at 29 U.S.C. §§ 201–219).

100. Henry J. Abraham, *Religion, Medicine, and the State: Reflections on some Contemporary Issues*, 22 J. Church & St. 423, 426 (1980).

themselves or their son, David became so ill that his parents abandoned their Christian Science beliefs and took him for medical care; a physician immediately diagnosed David with diabetes.[101] The doctor admitted David into the hospital, began daily insulin injections, and started David on a diabetic protocol.[102] David responded with a rapid recovery.

When David was released from hospital care, his parents reconsidered their resort to medical care and returned exclusively to spiritual practices for David's care. When David fell ill again, they admitted David into a Christian Science nursing home, a facility that did not administer medical care of any kind.[103] The child fell into a coma and died.[104] The state brought charges, but all charges were dropped when the judge opined that if "the failure to provide medical care is the result of religious tenet or a sincere belief in the inefficacy of medical treatment there may be no criminal responsibility under the law."[105] This case is particularly vexing. As discussed in Part IV.A.2, the law ordinarily requires that a parent take reasonable steps to rescue or protect his child from known dangers. These parents *knew* the child had diabetes and that he had responded quickly to a medical diabetic protocol. The parents also saw that David regressed rapidly when they gave him only spiritual treatments. The only question remaining is whether they made reasonable efforts to save David, knowing what they knew. One would be hard pressed to say that their return to the spiritual healing practice that had not worked previously was reasonable. Yet, the state law exonerated David's parents solely because they acted in vindication of their own religious beliefs.

Not only do religious exemption statutes leave children of certain parents at high risk, they also frequently create legal chaos for the parents. In 1986, two high-profile cases charging parents with murder and manslaughter of their children by denying them medical treatment for curable conditions hit the court system. The two cases, one from Florida and one from Massachusetts, both dealt with the deleterious legal effects created by religious exemptions that provide only partial immunity from prosecution.[106]

In Florida, the state charged the Hermansons with child abuse and third-degree murder in the death of their seven year old daughter, Amy, who died of diabetes when they failed to obtain medical treatment for

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101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. Abraham, *supra* note 100, at 427.

106. Commonwealth v. Twitchell, 617 N.E.2d 609 (Mass. 1993); Hermanson v. State, 604 So. 2d 775 (Fla. 1992).

her.[107] The jury found both parents guilty.[108] On appeal, the Hermansons argued that Florida's religious exemption statute[109] *caused* them reasonably to believe that withholding medical care for their daughter was lawful. The significance of the Hermansons defense cannot be overstated. The Hermansons themselves alleged a causal connection between the existence of a religious exemption statute and their failure to obtain medical treatment for Amy. Since they testified under oath that they withheld medical treatment *because* of the statute, one is led to the inevitable conclusion that they would have saved their daughter's life but for the statute. In any event, the Hermansons spent years defending themselves, finally succeeding in convincing Florida's Supreme Court that Florida's religious-exemption statute failed to give parents adequate notice regarding when their actions would become criminal.[110]

The second of the 1986 cases occurred in Massachusetts. Toddler Robyn Twitchell died under horrific circumstances of a treatable bowel obstruction while his parents and a Christian Science practitioner prayed

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107. Hermanson v. State, 604 So. 2d 775, 775 (Fla. 1992).

108. *Id.*

109. The statutory provisions are critical to the legal and constitutional issues presented in this case. Florida's child abuse and neglect statutes provide:

> (3)(a) "Neglect of a child" means:
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> 1. A caregiver's failure or omission to provide a child with the care, supervision, and services necessary to maintain the child's physical and mental health, including, but not limited to, food, nutrition, clothing, shelter, supervision, medicine, and medical services that a prudent person would consider essential for the well-being of the child; or
>
> 2. A caregiver's failure to make a reasonable effort to protect a child from abuse, neglect, or exploitation by another person.
>
> Neglect of a child may be based on repeated conduct or on a single incident or omission that results in, or could reasonably be expected to result in, serious physical or mental injury, or a substantial risk of death, to a child.
>
> (b) A person who willfully or by culpable negligence neglects a child and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to the child commits a felony of the second degree, punishable as provided in s. 775.082 , s. 775.083 , or s. 775.084.
>
> (c) A person who willfully or by culpable negligence neglects a child without causing great bodily harm, permanent disability, or permanent disfigurement to the child commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

FLA. STAT. ANN. § 827.03(a)–(c) (West 2012). The third-degree murder provision of the Florida Statutes provides that the killing of a human being while engaged in the commission of aggravated child abuse constitutes murder in the third degree and is a felony of the second degree. *Id.* § 782.04 (4).

110. PETERS, *supra* note 17, at 122. The Court "reversed the Hermansons' convictions because 'the legislature [had] failed to clearly indicate the point at which a parent's reliance on his or her religious beliefs in the treatment of his or her child becomes criminal conduct.'" *Id.*

for him.[111] Neighbors of the Twitchells testified that Robyn cried so loudly and persistently that they found it "absolutely unbearable."[112]

Robyn would have been two-years-old when the state prosecuted the Twitchells for manslaughter.[113] The jury found both parents guilty.[114] The Twitchells argued that an Attorney General's opinion regarding Massachusetts's religious exemption *misled* them into believing that their actions were lawful. To take their position to its logical endpoint, they, too, would have saved their child's life had there been no exemption. The Supreme Judicial Court of Massachusetts reversed, holding that an Attorney General's opinion regarding Massachusetts's religious exemption statute could have reasonably misled the Twitchells into believing their actions were lawful, thereby denying them due process of law.[115] As a society of laws, we cannot forget Robyn Twitchell. His suffering and death were not solely caused by his parents' adherence to a faith-healing tradition. The existence of a religious immunity statute was an inextricable part of the chain of events that were the proximate cause of Robyn's death. Robyn's parents, who thought they were protected from prosecu-

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111. *Twitchell,* 617 N.E.2d at 612–21. The opinion states:

> The defendants [were] practicing Christian Scientists who grew up in Christian Science families. They believe[d] in healing by spiritual treatment. During Robyn's five-day illness from Friday, April 4, through Tuesday, April 8, they retained a Christian Science practitioner, a Christian Science nurse, and at one time consulted with Nathan Talbot, who held a position in the church known as the "Committee on Publication." As a result of that consultation, David Twitchell read a church publication concerning the legal rights and obligations of Christian Scientists in Massachusetts. That publication quoted a portion of *G*. L. c. 273, § 1, as then amended, which, at least in the context of the crimes described in that section, accepted remedial treatment by spiritual means alone as satisfying any parental obligation not to neglect a child or to provide a child with physical care.

Id. at 612.

112. PETERS, *supra* note 17, at 123 (citing Doris Se Wong, *Neighbor calls Twitchell's Son's Cries, Unbearable*, BOSTON GLOBE, May 24, 1990, at 92).

113. *Twitchell*, 617 N.E.2d at 611. The Twitchells raised the defense of entrapment by estoppels. *Id.* at 619. "Entrapment by estoppels has been held to apply when an official assures a defendant that certain conduct is legal, and the defendant reasonably relies on that advice and continues or initiates the conduct." United States v. Smith, 940 F.2d 710, 714 (1st Cir. 1991) (citation omitted); *see* United States v. Austin, 915 F.2d. 363, 365-66 (8th Cir. 1990) (stating that "[d]efendants have the burden of proof to establish that they were misled by the statements of a government official into believing that their conduct was lawful").

114. *Boston Jury Convicts 2 Christian Scientist in Death of a Son*, N.Y. TIMES, July 5, 1980, at A12.

115. PETERS, *supra* note 17, at 125. At his trial, Mr. Twitchell called a medical doctor to testify on his behalf. *Id.* at 124. Twitchell testified that his own lack of faith caused his prayers for his son to be ineffective. *Id.*

tion, spent years in court defending themselves. The limited religious immunity statute betrayed everybody.

Three years later in 1989, three year old Ian Lundman died in Minnesota from untreated diabetes.[116] The state brought second-degree manslaughter charges against the mother and stepfather of the child, the McKown's, and the Christian Scientist practitioner who assisted them in prayer and spiritual readings.[117] The charges were dismissed because while there was no specific religious exemption for manslaughter, there was a statute protecting parents for child neglect.[118] The court concluded that the confusion in the statutes provided the defendants the right to depend upon Christian Science healing methods "so long as they did so in good faith."[119] While it would seem that the good faith of the defendants would be a question for the jury, the case never went to trial.[120] In the majority of child-death cases, the entire tragic matter would have ended when the criminal cases were dismissed, but not so in this case.

Ian's father brought a civil suit against his former wife, the stepfather, the practitioner, and the Christian Science church.[121] The jury awarded Lundman $5.2 million dollars in compensatory damages and $9.15 million dollars in punitive damages.[122] The religious exemption that shielded the defendants from criminal prosecution did not apply to civil damages.[123] In this case, the law gave protection to the parents with one hand and then took it away with the other. Whatever one might think of the defendants' decision to treat Ian with prayer alone, one must concede that the laws of Minnesota were a trap for the unwary religious parents regardless of their "good faith."[124]

While in the cases discussed above, the parents were ultimately exonerated, not all religious parents have been so lucky. In the late 1980s, California prosecuted Laurie Walker for felony child endangerment and

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116. State v. McKown, 475 N.W.2d 63, 64 (Minn. 1991).

117. Lundman v. McKown, 530 N.W.2d 807, 815 (Minn. Ct. App. 1995).

118. *Id.*

119. *McKown*, 475 N.W.2d at 68.

120. *Id.*

121. *See Lundman*, 530 N.W.2d at 807 (affirming $1.5 million in compensatory damages, but reversing the award of $9.15 million in punitive damages on constitutional grounds stating the award against the Church violated the Church's right to espouse religious faith).

122. *Id.* at 815. The trial court granted a post-trial motion for remittitur of the compensatory damages from $5.2 million to $1.5 million. *Id.*

123. *Id.*

124. *Id.* Although Minnesota statutes exempt spiritual healers from criminal charges of child neglect, the court found that it was appropriate to bring disputes involving consequences of religious-based conduct before the civil courts where the underlying lawsuit is not an attack on religious beliefs or principles. *Id.*

involuntary manslaughter in the death of her four-year-old.[125] Walker's defense was based on the very same premises as the Hermansons and the Twitchells, alleging that a religious exemption found in the California Penal Code 270 caused her to believe that her actions were lawful.[126] The same issue of limited religious immunity existed; therefore, one would expect Walker ultimately to be exonerated as well. She was not. The Supreme Court of California held that immunity for one crime could not reasonably be misunderstood to be immunity for a more serious crime.[127] California's limited religious exemption statute betrayed Laurie Walker, and played a part in her daughter's death.

The last case, which is also the earliest, is that of Audra Kay Whitney. The Audra Kay Whitney case is notable among faith healing cases for its many bizarre twists. Audra Kay died when her medical emergency occurred while she was in the care of a relative who was a Christian Scientist. The relative took her to a Christian Science practitioner, where Audra Kay died of childhood diabetes.[128] When her father returned from a business trip and found what had happened to his child, he pressed criminal charges against the practitioner to no avail. Twenty-two years later, Mr. Whitney methodically cornered the practitioner in a glass elevator and shot through the glass door hitting him three times with a .32 caliber pistol.[129]

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125. *See* Walker v. Super. Ct., 763 P.2d 852, 855 (Cal. 1988) (holding that exemption to misdemeanor child neglect for parents using prayer treatment instead of medical care to treat their children of serious medical issues did not provide a defense to prosecution for involuntary manslaughter and felony child endangerment).

126. *See id.* at 856 (noting that defendant contends Section 270 of the California Penal Code provides a complete defense to any prosecution based on the treatment of her child's illness with prayer as opposed to medical care). Section 270 provides certain necessities that parents must provide their children, and failure to do so results in a misdemeanor. *Id.* The statute was enacted in 1872 and stated that every parent of any child who fails to provide his or her child with necessary food, clothing, shelter, and medical attention is guilty of a crime. *Id.* The statute was amended in 1925 to include the phrase "or other remedial care." *Id.* The statute was amended once again in 1976 to clarify that "treatment by spiritual means through prayer alone" falls under "other remedial care." *Id.*

127. *See id.* at 872 (stating that a person relying on prayer treatment must estimate correctly the point at which their conduct transitions into criminal negligence, and at this point an incorrect estimation absolves immunity to a more serious crime).

128. *See* PETERS, *supra* note 17, at 109–10 (stating that a simple regimen of insulin shots would have saved the little girl's life, but the Christian Scientist relied only on a Christian Science practice of removing the "illusion" of the illness, which failed).

129. *See id.* at 109–10. Ironically, police officers took the injured practitioner against his will to a hospital where expert medical care saved his life. *Id.* at 110. When asked about this departure from Christian Science practice principles, a spokesperson for the church claimed "emergency operations did not violate its proscription of medical treatment." *Id.*

The state of Illinois charged Whitney with attempted murder.[130] Whitney stated unequivocally that he had shot the practitioner and had intended to kill him.[131] Whitney stated further, "I did it because he killed my daughter."[132] Whitney could scarcely claim that he acted in the heat of passion.[133] The act he avenged happened twenty-two years previously. Temporary insanity would also seem to be a weak defense for Whitney insofar as he bought the gun in Birmingham, Alabama, and traveled to Chicago with the express intent to kill the practitioner.[134] Despite Whitney's confession and the absence of any other traditional criminal defense, the jury acquitted Whitney of attempted murder just as years earlier a jury had acquitted the practitioner of manslaughter. This case presents the ultimate in the wild legal abandon into which these cases seem to fall. The religious-exemption statutes either are too confusing to impose upon an unsuspecting defendant, or juries ignore well-established law in an effort to make things come out right.

B. *Recent Developments*

Since the early 1990s, few states have prosecuted parents for the unnecessary deaths of their children.[135] The notable exception has been Oregon. In 1999, a divided Oregon legislature took a first step towards reducing the high child death rate in the state by eliminating statutory immunity for parents who committed second-degree manslaughter or first- or second-degree criminal mistreatment.[136]

The first couple to be prosecuted under the amended statute was Tim and Rebecca Wyland of the Followers of Christ Church. The Wylands treated their seventeen month old daughter with prayer alone for a

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130. *Id.* at 110.

131. *Id.*

132. *Id.*

133. WAYNE R. LAFAVE, CRIMINAL LAW 829 (West 5th Ed. 2010). Voluntary manslaughter in most jurisdictions consists of an intentional homicide (or attempted homicide) committed under extenuating circumstances that mitigate, but do not justify or excuse, the killing. The principle circumstance is the fact that the defendant, when he killed the victim, was in a state of passion engendered in him by an adequate provocation. *Id.* By the majority view, however, a provoked defendant cannot invoke "heat of passion" where the provocation and the time elapsing between is such that a reasonable man thus provoked would have cooled. *Id.*

134. PETERS, *supra* note 17, at 110.

135. The state Medical Examiner of Oregon reported that more than twenty children of the Followers of Christ Church members alone had died in recent decades from preventable or curable illnesses. None of the parents were prosecuted.

136. *See* Mark Larabee, *Bill Aims to Lift All Oregon Religious Shields,* THE OREGONIAN (Jan. 22, 1999), http://www.rickross.com/reference/foc/foc8.html (indicating that in 1999, this bill "would remove religious shields from Oregon's criminal codes").

hermangioma that ultimately covered her entire eye and invaded her skull.[137] The child sustained permanent impairment.[138] The state prosecuted the Wylands for criminal mistreatment.[139] A unanimous jury found them guilty in less than an hour.[140] Because the Wylands were first offenders, Oregon's sentencing guidelines called for a maximum sentence of ninety days in jail to be issued.[141]

In 2011, Oregon prosecuted Dale and Shannon Hickman, members of the Followers of Christ Church, for second-degree manslaughter under Oregon's amended statute.[142] The Hickmans prayed while their premature newborn son died.[143] The jury found them guilty, and a Clackamas County judge sentenced Dale and Shannon Hickman to six years in prison.[144] Though the defendants promised to do whatever the court ordered in terms of providing medical care for their other two children in return for probation, the court was unmoved stating: "[A]s the evidence unfolded and the witnesses testified, it became evident to me and certainly to the jury . . . that this death just simply did not need to occur."[145]

Following the high-profile Wyland and Hickman cases, the governor of Oregon, a doctor himself, signed a bill into law in 2011 that eliminated spiritual treatment as a defense against all homicide charges.[146] District Attorney John Foote stated that for the first time since 2008, there were

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137. Steve Mayes, *Rebecca and Timothy Wyland Sentenced to 90 Days in Jail, Probation in Oregon City Faith Healing*, OREGANLIVE (June 24, 2011, 10:27 AM), http://www.oregonlive.com/oregon-city/index.ssf/2011/06/oregon_city_faith_healing_couple_sentenced_to_90_days_in_jail_and_three_years_probation.html.

138. *Id.*

139. *Id.*

140. *Timothy, Rebecca Wyland Guilty of Criminal Mistreatment in Faith-Healing Trial*, RELIGIONNEWSBLOG (June 8, 2011), http://www.religionnewsblog.com/26016/timothy-rebecca-wyland-guilty-of-criminal-mistreatment-in-faith-healing-trial.

141. Mayes, *supra* note 137.

142. Nicole Dungca, *Opening Statements Begin in Trial of Dale and Shannon Hickman of the Followers of Christ Church*, OREGANLIVE (Sept. 14, 2011, 10:21 AM), http://www.oregonlive.com/oregon-city/index.ssf/2011/09/motions_begin_in_trial_of_dale_and_shannon_hickman_of_the_followers_of_christ_church.html.

143. *Id.*

144. Steve Mayes, *Dale and Shannon Hickman Receive 6-Year Sentence, Harshest Yet for Faith-Healing Church*, OREGANLIVE (Oct. 31, 2011, 8:38 PM), http://www.oregonlive.com/oregon-city/index.ssf/2011/10/dale_and_shannon_hickman_of_fo.html [hereinafter Mayes II].

145. *Id.*

146. *See House Bill 2721,* OREGANLIVE, http://gov.oregonlive.com/bill/2011/HB2721/ (last visited Apr. 19, 2012) (discussing Oregon HB 2721, which eliminates the defense of relying on spiritual treatment for certain crimes involving a victim under the age of eighteen). *See also* Mayes II, *supra* note 144 (indicating that the Oregon legislature had eliminated the exemption that would allow for the reliance on spiritual treatment as a defense).

no church members awaiting trial.[147] Foote added: "We have evidence . . . that many members of the church are now quietly taking their children to doctors outside Oregon City."[148]

VI. How the Majority of States Came to Have Religious Exemption Statutes

Since adherents of faith-healing practices are so relatively few in numbers, one must question why the majority of states have enacted statutes specifically protecting faith-healing parents. There are four reasonably plausible explanations for these statutory exemptions; the first explanation is the most compelling. The four explanations are: (1) The states enacted spiritual exemptions solely in order to comply with the 1974 Child Abuse Prevention and Treatment Act; (2) the states misapprehend the distinctions between the absolute First Amendment right to hold religious beliefs and the limited right to act upon them; (3) the states overestimate the rights of parents to the unrestricted care and control of their children; and (4) the states harbor a deep-seated reluctance to punish parents who have lost a child because their faith healing efforts failed. Each of these hypotheses is addressed in turn below.

A. *The 1974 Child Abuse Prevention and Treatment Act and Its Ramifications*

In 1974, Congress passed the Child Abuse Prevention Treatment Act (CAPTA) and appropriated funds to qualifying states to establish programs to reduce the incidences of child abuse and neglect.[149] However, the 1974 act contained a worrisome provision that appeared to require qualifying states to enact a spiritual treatment exception:

> A parent or guardian legitimately practicing his religious beliefs who thereby does not provide specific medical treatment for a child, for that reason alone shall not be considered a negligent parent or guardian. However, such exception shall not preclude a state from ordering medical services be provided to the child, where his health requires it.[150]

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147. Mayes II, *supra* note 144.

148. *Id.*

149. Walter Wadlington, *Medical Decision Making for and by Children: Tensions Between Parent, State, and Child*, 1994 U. Ill. L. Rev. 311, 324 (1994). To receive federal funds under the Child Abuse and Prevention Act, a state must enact a child abuse reporting law meeting federally established guidelines. *Id.* at 324–25.

150. *Id.* "Although the initial guidelines established by the supervising federal agency (in 1974, the Department of Health, Education and Welfare) did not require that states

In order to obtain funds, every state either enacted a spiritual exemption, or modified a pre-existing one, to conform to the perceived requirements of the 1974 CAPTA. By 1983, however, new CAPTA regulations stated unambiguously: "Nothing in this part should be construed as requiring or prohibiting a finding of negligent treatment or maltreatment when a parent or guardian practicing his or her religious beliefs does not . . . provide medical treatment for a child . . . . "[151] As of 1983, the states were free to abolish their religious exemptions and still obtain CAPTA funding. Since few states found it important to enact religious exemptions prior to the 1974 CAPTA requirement, one might assume that the states would repeal their religious exemptions when the new federal regulations were promulgated in 1983; yet, most states left the exemptions in effect.[152] One must question *why* the states have kept statutes that consistently give rise to needless child deaths and unfair prosecutions of parents.

B. *Why States Retain Religious Exemptions: A Likely Answer and Three Poor Excuses*

1. Ignorance Concerning the Statutes and Political Motives: The Answer

The most likely answer to why states retain religious exemptions can be contributed to ignorance and pure politics. There are three possible political reasons why spiritual exemptions—at odds with public policy—remain in effect. The first possible answer seems the least likely. One might assume that the legislators of every state have reevaluated their religious exemptions in light of the 1983 regulations and found them to have ongoing value to the citizenry. Since most states enacted the religious exemptions strictly for monetary gain in 1974, it seems highly unlikely that legislators would attach special value to statutes that privilege only relatively small religious groups—if they were actually to review the statutes. On the contrary, it seems more probable that the majority of legislatures never gave any further thought to the exemptions that were hastily passes into the law in 1974. After taking a closer look at their exemptions, five states repealed them concluding that too many children

include medical neglect in their definitions of child abuse, the guidelines included a model provision for religious accommodation." *Id.*

151. 45 C.F.R. § 1340.2 (d)(3)(ii) (1983).

152. Donna K. LeClair, *Faith-Healing and Religious Treatment Exemptions to Child-Endangerment Laws: Should Parental Religious Practices Excuse the Failure to Provide Necessary Medical Care to Children?*, 13 U. DAYTON L. REV. 79, 96–97 (1987).

had died who could have been saved by ordinary medical care.[153] Consequently, the answer for the retention of such statutes must lie elsewhere.

The second possible answer seems somewhat more likely. State legislatures do not actually realize that they have statutes from the 1970s that jeopardize children and pseudo-protect their parents. When a child dies, it is the court, not the legislature that has to come to grips with these seldomly used statutes. If this hypothesis is true, ignorance proves to be political bliss for legislators. What they do not know clearly is not hurting them politically.

The third, and most disturbing answer, is purely political. At least some members of state legislatures realize that the religious exemptions exist, but they fear attracting negative public attention to themselves by advocating repeal of anything having to do with religion. For example, let us assume that a very conscientious legislator is aware that his state has a 1970s religious exemption that provides total criminal immunity for a parent who withholds medical care for a child for religious reasons. The thoughtful legislator believes the child's right to medical care trumps any religious practice of the parent, but he also knows his constituency is made up of people who are "somewhat or very religious."

First, the good legislator might reasonably fear that his prospects for reelection will be damaged if he sponsors a bill in favor of anything that has the word "religious" attached to it. Second, the legislator might consider all the good things he can achieve if, but only if, he is reelected. Ultimately, he chooses not to raise the issue of the religious exemption, perhaps assuring himself that when the right case comes along, he will address the issue. If the thoughts of the hypothetical legislator reflect those of most elected officials, it seems entirely plausible that many state legislators, having had the exemptions thrust upon their state in the 1970s solely to obtain federal money, find themselves now politically afraid to get rid of them. While I address other excuses below as to why the statutes retain religious exemptions, I contend that this purely political one rings most true.

2. Excuse One: The First Amendment Free Exercise Clause

In *Thomas v. Review Board*,[154] the Court opined that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in

153. William McCall, *Child Deaths Test Faith-Healing Exemption*, ASSOCIATED PRESS, Nov. 22, 2008, http://www.rickross.com/reference/foc/foc29.html. The states are Hawaii, Maryland, Massachusetts, Nebraska, and North Carolina. *Id.*

154. 450 U.S. 707 (1981).

order to merit First Amendment protection."[155] This statement and others like it might appear to say that the states must defer to any actions taken in conjunction with any religious belief; yet, every student of law knows better. Every law school teaches the elegant constitutional distinctions between mandated deference to belief versus the states' right to limit religious actions. The majority of lawmakers, however, are not trained in the law. In fact, they may possess nothing more than a general, gauzy belief that states are required—or at least would be better off—taking a hands-off approach to anything having to do with religion. If this hypothesis is true, we may assume that at least some legislatures have retained their 1970s religious exemptions because they think that the First Amendment requires it. In reality, the First Amendment has never required the health and welfare of a child to suffer the religion of the parents.

While the 1878 case of *Reynolds v. United States*[156] deals with polygamy rather than parent-child controversies,[157] it set the stage for later decisions involving religious parents and their children. Mr. Reynolds, a Mormon, practiced polygamy in accordance with his faith.[158] However,

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155. Thomas v. Review Bd., 450 U.S. 707, 714 (1981) (explaining that the denial of unemployment to a Jehovah's Witness who quit his job after being asked to engage in a task that violated his religious beliefs infringed on his "First Amendment right to free exercise of religion").

156. 98 U.S. 145 (1878).

157. *See* Reynolds v. United States, 98 U.S. 145, 166 (1878) (discussing whether polygamists have a First Amendment right to engage in bigamy, against the laws of the Territory of Utah, due to their long-held belief in the requirement of the practice of plural marriages for salvation).

> In our opinion, the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted [sic] from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.

Id.

158. *Id.* at 161. Furthermore the opinion states:

> [I]t was an accepted doctrine of that church "that it was the duty of male members of said church, circumstances permitting, to practi[c]e polygamy; . . . that this duty was enjoined by different books which the members of said church believed to be of divine origin, and among others the Holy Bible, and also that the members of the church believed that the practice of polygamy was directly enjoined upon the male members thereof by the Almighty God, in a revelation to Joseph Smith, the founder and prophet of said church; that the failing or refusing to practi[c]e polygamy by such male

when federal officials discovered that Mr. Reynolds was practicing polygamy, they took him into custody and charged him with bigamy.[159] In charging Mr. Reynolds with bigamy, the federal authorities relied on Section 5352 of the Revised Statutes of 1875, which states the following:

> Every person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than $500, and by imprisonment for a term of not more than five years.[160]

Reynolds did not dispute that he was a polygamist.[161] Reynolds defended his actions upon a claim of absolute freedom to practice his religion.[162]

The Court opined that Reynolds's actions, while religiously motivated, violated the strong public policy of the United States to restrict marriage to one man and one woman.[163] The Court through Justice Waite stated:

> [I]t may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal.[164]

Reynolds's conviction stood, despite the sincerity of his belief.[165] The following portion of the opinion makes plain the principle that religious

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members of said church, when circumstances would admit, would be punished, and that the penalty for such failure and refusal would be damnation in the life to come." *Id.*

159. *Id.* at 146.

160. Crimes Arising Within the Maritime and Territorial Jurisdiction of the United States, ch. 3, 18 Stat. 1042, 1044 (1875).

161. *Reynolds*, 98 U.S. at 161.

162. *Id.* at 161–62 (stating that Mr. Reynolds asked the trial court to instruct the jury to find him not guilty of bigamy if the jury found that he acted pursuant to his religious belief).

163. *See id.* at 165 (expressing that although a marriage is sacred in nature, it is also a civil contract regulated by law).

164. *Id.*

165. *Id.* at 167 (explaining that when Mr. Reynolds married the second time, knowing that he was already married, he broke the law).

action must yield to the law of the land when the law is supported by a substantial public policy:

> So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.[166]

It is critical to consider that the Court could have set forth a religious exemption that allowed sincere polygamists to practice plural marriage with impunity. However, the Court relied on the nation's public policy that an individual's religious practices must not be superior to the laws of the land and, as a result, it declined to create a religious exemption. In 1944, the Court In *Prince v. Massachusetts*,[167] adapted that principle to a case when a religious parent sought to practice her Jehovah's Witness faith in violation of child labor laws.

Sarah Prince was a Jehovah's Witness who followed the teachings of her faith by disseminating pamphlets upon the public streets.[168] On occasion, she took her children in the evenings to assist in handing out the pamphlets.[169] The recipients of the materials paid one nickel. An officer took Ms. Prince into custody for child labor violations.

Prince predicated her defense upon her liberty interest in freedom of religion and the right to inculcate her beliefs in her children.[170] The Court relied upon Reynolds in rejecting her claims, making a far-reaching, indeed prescient, claim for the power of the state to protect children from the religious acts of their parents:

> [T]he family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond imitation. Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience.

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166. Reynolds v. United States, 98 U.S. 145, 166–167 (1878) (emphasizing that if individuals are allowed to act on every religious belief, they will overstep on the laws regulating society).

167. 321 U.S. 158 (1944).

168. Prince v. Massachusetts, 321 U.S. 158, 161 (1944).

169. *Id.* at 162.

170. *Id.* at 164.

> Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. *The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death*.[171]

Thus, as early as 1944, the Court unflinchingly validated the states' authority to override parental decisions that expose a child to danger based upon religious motivation. The Court telegraphed its future intent to protect children from their parents' risky religious practices by going beyond the facts of the case before the Court to catalogue *other* dangers that would be impermissible. After *Prince,* the states could have no further real question that public policy protectionism for the physical, temporal welfare of children comes ahead of validation of the religious interest of the parents.

3. Excuse Two: The Fundamental Rights of Parents to the Care and Control of their Children

Parents possess a paramount and fundamental right to guide the upbringing of their children.[172] The Due Process Clause protects those liberties that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental"[173] from unwarranted interference by the state. The right, or as some would argue the *privilege*,[174] to rear one's own offspring is unquestionably a protected liberty interest.[175] The United States Supreme Court stated that "the custody, care and nurture of the child rests first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[176] The parents possess these rights in their children because the

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171. *Id.* at 166–67 (emphasis added).

172. *Id.* at 165–66.

173. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

174. James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CALIF. L. REV. 1371, 1374 (1994). "Thus, in a world without parents' rights but with an appropriate set of children's rights, the law could recognize parents as their children's agents . . . ." *Id.* at 1429; *see also* James G. Dwyer, *Symposium: Spiritual Exemptions to Child Medical Neglect Laws: What We Outsiders Should Think*, 76 NOTRE DAME L. REV. 147, 163–64 (2000) (discussing that parents should not be viewed as rights-holders, but fiduciaries).

175. *Prince,* 321 U.S. at 166. *But see* PETERS, *supra* note 17, at 196 (explaining that a 1992 survey revealed that there "was little public backing for religious exemptions to manslaughter and neglect laws," referring to parents who refuse to give medical attention to their children because of their religious beliefs).

176. *Prince*, 321 U.S. at 166. Parents have a fundamental liberty interest in the upbringing and education of their children. Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

Court observed that parents by natural disposition will more often than not act as natural protectors of their children.[177]

In *Troxel v. Granville*,[178] the Court confirmed that the decisions of a fit parent merit special legal deference.[179] According to child psychiatrists, who agreed with the Court, parents are in a better position to provide specialized care for a child; and only a parent or parent figures can maintain the stable environment and psychological parenting that are "critical to every child's healthy growth."[180] But, what if a parent, because of his religion, does not take actions toward his child that reflect the "natural protector" that the Court presupposes parents to be? What if the specialized care is tantamount to no care at all? In other words, what if the parent fails to take reasonable steps to rescue and protect his own child, as tort law requires? In such cases, the state clearly can step in and protect the child.[181] In other non-harmful religious decisions of parents, the state must defer to the parents.[182] Therefore, parents can insist that their minor children attend mosque services, synagouge, or Sunday school, even if the child does not wish to attend. Moreover, the same parents are equally free to deny their young children the right to attend any religious services; and instead, steer them into agnosticism or atheism. For the state to superimpose its vision of what is best for the child in such situations impermissibly infringes upon the parent's liberty interest in parenting. As a sectarian nation, the state has no legitimate interest in directing the religious upbringing of children so long as that upbringing does no physical harm to the child.[183]

Yet, the weighty constitutional liberty interest of parents must be limited by the harm principle.[184] When parents exceed their common law privilege of reasonable discipline[185] or exceed the bounds of the law and

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177. Parham v. J.R., 442 U.S. 584, 602 (1979).

178. 530 U.S. 57 (2000).

179. Troxel v. Granville, 530 U.S. 57, 58 (2000).

180. GOLDSTEIN, FREUD, AND SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 9–10 (1979).

181. *See Prince*, 321 U.S. at 166 ("[T]he state as *parens patriae* may restrict the parent's control . . . .").

182. *Id.* at 167.

183. *Id.*

184. Barbara Plank, *John Stuart Mill*, LIBERAL INT'L, http://www.liberal-international.org/editorial.asp?ia_id=685 (last visited Apr. 19, 2012) (citing John Stuart Mill proposing that harm to others is the only limitation on a person's freedom). The harm principle is commonly described using the analogy that "[y]our right to swing your arms ends just where the other man's nose begins." Zechariah Chafee Jr., *Freedom of Speech in War Time,* 32 HARV. L. REV. 932, 957 (1919).

185. *See* RESTATEMENT (SECOND) OF TORTS § 147(a) (1965) ("A parent is privileged to apply such force or to impose such reasonable confinement upon his child as he reasonably believes to be necessary for its proper control, training or education.").

cause harm to their children,[186] they are routinely subjected to state intervention.[187] No state is constitutionally compelled to turn a blind eye to the suffering of minor children. The child is the child of her parents, but while she remains underage, she is also a child of the state. The hands of the states are not tied simply because an otherwise fit parent chooses to treat his child's life-threatening illness by prayer alone. Under the parens patriae doctrine and state child welfare acts,[188] the state can intervene to

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186. *See In re* T.A., 663 N.W.2d 225, 229, 231 (S.D. 2003) (declaring T.A. to be in need of supervision after his step-father spanked him with a belt so hard as to leave welts over his entire torso). "In reviewing abuse and neglect findings by the trial court, it is our duty to 'uphold the trial court's decision unless the findings of fact are "clearly erroneous."'" *Id.* at 229. *See also* Deana Pollard Sacks, *State Actors Beating Children: A Call for Judicial Relief*, 42 U.C. DAVIS L. REV. 1165, 1215 (2009) (describing corporal punishment in U.S. schools). "Between 1783 and 2002, every industrialized country in the world has acted to prohibit school corporal punishment except the [United States], Canada, and one province in Australia." *Id.*

187. *In re* D.K., 58 Pa. D. & C. 4th 353, 354, 361 (Pa. Comm. Pl. 2002) (declaring a sixteen year old boy dependent because his weight had grown to 451 pounds, causing him to suffer numerous health concerns). *See also In re* S.T., 928 P.2d 393, 396, 401 (Utah App. 1996) (removing four children from their parents for unsanitary home conditions and an unexplained burn on the palm of one child); *In re* N.M.W., 461 N.W. 2d 478, 479, 482 (Iowa App. 1990) (terminating the mother's parental rights because she failed to clean her apartment after repeated visits from the Department of Human Services).

188. *See* UTAH CODE ANN. 78A-6-105 (LexisNexis 2008) (providing definitions which are generally representative of child protective statutes in the other states).

(1)(a) "Abuse" means:
(i) nonaccidental harm of a child;
(ii) threatened harm of a child;
(iii) sexual exploitation; or
(iv) sexual abuse.
(b) "Abuse" does not include:
(i) reasonable discipline or management of a child, including withholding privileges;
(ii) conduct described in Section 76-2-401; or
(iii) the use of reasonable and necessary physical restraint or force on a child:
(A) in self-defense;
(B) in defense of others;
(C) to protect the child; or
(D) to remove a weapon in the possession of a child for any of the reasons described in Subsections (1)(b)(iii)(A) through (C).
(2) "Abused child" means a child who has been subjected to abuse.
(3) "Adjudication" means a finding by the court, incorporated in a decree, that the facts alleged in the petition have been proved.
. . . .
(25)(a) "Neglect" means:
(i) abandonment of a child, except as provided in Title 62A, Chapter 4a, Part 8, Safe Relinquishment of a Newborn Child;
(ii) lack of proper parental care of a child by reason of the fault or habits of the parent, guardian, or custodian;

save a neglected child, and there is no constitutional mandate that the states provide the parents with immunity for their failure to act.

4. Excuse Three: Reluctance to Punish Parents

The three most commonly cited justifications for imprisonment are the following: (1) protection of the public at large,[189] (2) deterrence of the defendant and others from committing such acts,[190] and (3) punishing the defendant.[191] None of these justifications seems to fit with the punishment of a bereaved parent.

a. Are the Parents a Threat to the Public at Large?

No one seriously argues that religious parents, whose prayers have failed to save their child's life, present a threat to the public. Their beliefs can have no effect on those of us who do not subscribe to the same beliefs, a fact that helps explain the sanguine attitude of the public about the whole subject. If, however, a believer in spiritual healing isolated the child of a public figure, such as Malia Obama,[192] and withheld medical care in good faith until she died, the entire nation would mourn the loss, and there would be a public backlash against religious exemptions.

(iii) failure or refusal of a parent, guardian, or custodian to provide proper or necessary subsistence, education, or medical care, or any other care necessary for the child's health, safety, morals, or well-being; or

(iv) a child at risk of being neglected or abused because another child in the same home is neglected or abused.

Id.

189. JOSEPH J. SENNA & LARRY J. SIEGAL, INTRODUCTION TO CRIMINAL JUSTICE 33 (3d ed. 1984). The purpose of incapacitation "is protection of the law-abiding members of society by limiting the activities and freedom of known criminals." *Id.*

190. *Id.* at 32. "[R]esearch on deterrence has provided little hard evidence that deterrent measures can actually achieve their desired effect." *Id.*; FRANKLIN E. ZIMRING, CRIME AND DELINQUENCY ISSUES: PERSPECTIVES ON DETERRENCE 3 (1971).

The theory of simple deterrence is that threats can reduce crime by causing a change of heart, induced by the unpleasantness of the specific consequences threatened. Many individuals who are tempted by a particular form of threatened behavior will, according to this construct, refrain from committing the offense because the pleasure they might obtain is more than offset by the risk of great unpleasantness communicated by a legal threat.

ZIMRING, *supra*.

191. SENNA & SIEGAL, *supra* note 189, at 103. "Retribution or revenge rests on the idea that it is right for the offender to be punished. This view holds that each person is responsible for individual actions and deserves to be punished with breaking societal norms." *Id.*

192. Malia is the eldest daughter of President Barack Obama and First Lady Michelle Obama. Colleen Curtis, *First Look: New Obama Family Portrait,* THE WHITEHOUSE BLOG (Dec. 15, 2011, 12:00 PM), http://www.whitehouse.gov/blog/2011/12/15/first-look-new-obama-family-portrait.

Likely, every spiritual exemption left over from the 1970s would be immediately repealed. But, that scenario is improbable. Spiritual healing believers usually confine their practices to themselves and their own children. So, concededly, such people do not pose a threat to public safety.

b. Will Criminal Sanctions Deter Others from Withholding Medical Care from their Children?

In her eloquent article,[193] Anne Lederman argues that the threat of imprisonment will have little, or no, deterrent effect on parents. She contends that religious parents will not abandon their spiritual practices because they believe that to do so would actually harm the child.[194] In some cases, Lederman may be correct. In so many cases, however, the parents' testimony at trial indicates clearly that they wished to engage in spiritual practices, but they also were strongly motivated to remain within the bounds of law.

In *Twitchell*,[195] The Massachusetts Supreme Judicial Court reversed the convictions, stating, pointblank, "Evidence showed that the defendants were deeply motivated toward helping their child, while at the same time seeking to practice their religion *within the limits of what they were advised that the law permitted*."[196] The Hermansons also argued that they were influenced by the existence of a religious exemption.[197] The same can be said for Rita McKown[198] and Laurie Walker.[199] The specter of

193. Lederman, *supra* note 34, at 923.

> Enhancing the child's welfare motivates the parent's religiously influenced decision, not avoiding legal culpability or obtaining any tangible benefits from the state. Because the religious directives embody the power of the sacred, the parent who unquestioningly relies on faith and spiritual healing perceives much greater harm to the child in deviating from those tenets than in the threat of prosecution from the state.

Id. at 923–24.

194. *Id.*

> The sincere intent of religious parents to promote the child's well-being also limits the deterrent effect of the threat of legal punishment. For the believer in spiritual healing, the choice is not between the child's health and the individual's selfish desire to act on his religious belief. Rather, the reliance on spiritual treatment stems from an honest feeling that it is the most effective way of caring for oneself and one's child. Attesting to the sincerity of the Christian Scientist position that spiritual treatment most effectively promotes the child's well-being, the Manager of the Christian Science Church's Committee on Publication, Nathan A. Talbot, explains that "if the only two options for care were medical treatment or no treatment, Christian Scientists like others would undoubtedly choose medical treatment."

Id. at 923 (footnote omitted).

195. Commonwealth v. Twitchell, 617 N.E.2d 609, 611–12 (Mass. 1993).

196. 604 So. 2d 775 (Fla. 1992).

197. Hermanson v. State, 604 So.2d 775, 780–81 (Fla. 1992).

198. State v. McKown, 475 N.W.2d 63, 64 (Minn. 1991).

spending six years in prison motivated Dale and Shannon Hickman to promise the court that they would seek medical treatment in the future for their surviving children.[200] These cases and others like them lead inescapably to the conclusion that the existence of religious exemptions does in fact influence parental behavior.[201]

c. Will Imprisoning Parents Serve Any Appropriate Function of Justice?

After Ian Lundman died, MarieAlena Castle began an attempt to repeal Minnesota's religious exemption.[202] She persuaded two members of the Minnesota legislature to sponsor the bill.[203] Ian Lundman' father, Doug Lundman, and a handful of others gave testimony about the losses they had personally sustained as a result to faith healing practices.[204] Senators Allan Spear and John Marty, who blocked the repeal bill in the Senate, indicated that "they did not want to prosecute well-meaning parents."[205] The problem is that Ian's mother *was* prosecuted in Minnesota. One must assume either that the legislators did not see the irony of their position; or as previously suggested, they had a personal political concern about casting a vote against a religious exemption.

There is considerable merit to an argument that when our prison system is bursting,[206] it seems counter-productive to send otherwise law-abiding parents to prison, *especially when they were entrapped by a religious exemption*.[207] Creative sentencing might, however, ameliorate the

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199. Walker v. Super. Ct., 763 P.2d 852, 855 (Cal. 1988)

200. *Supra* Part V.B, notes 141 thru 145.

201. *See* People v. Rippberger, 231 Cal. App 3d. 1667 (1991); State v. Norman, 61 Wash App 16 (1910)

202. *See* MarieAlena Castle, *No Legal Protection for Kids in Faith-Healing Families: Why Most States Sanction Religion-Based Child Sacrifice*, ATHEISTS FOR HUM. RTS., http://atheistsforhumanrights.org/child.htm (last visited Apr. 19, 2012) (describing Castle's lobbying for repeal of the Minnesota faith healing statutes, in her own words).

203. *Id.* Namely, Castle persuaded Representative Phil Carruthers and Representative Jane Ranum to support the bill against the religious exemption in Minnesota. *Id*.

204. *Id.* Castle described the five-year process of attempting to repeal the religious exemption statute as "lengthy and painful." *Id*. Joni Clarke testified about her baby dying because of Clarke's adherence to faith-healing, and Sue McLaughlin discussed the lack of medical attention due to her parents' Christian Science beliefs, resulting in her mental and physical handicap. *Id*.

205. *Id.* The repeal bill won in the House Judiciary Committee 15-5, and won on the House floor 101-30. *Id*.

206. STATE OF CONN., WHAT IS CAUSING PRISON OVERCROWDING? 1 (2007), *available at* http://www.ct.gov/opm/lib/opm/cjppd/cjresearch/recidivismstudy/whatiscausingprisonovercrowding.pdf.

207. Imprisonment for these parents will be costly to the state. According to estimates, it costs the state about thirty thousand dollars a year to house one inmate. *Sandra*

social ills that imprisoning parents can cause. The court could impose weekends-only jail terms that allow one parent to remain home if there are other children. The courts can always dispense with incarceration in favor of probation and community service, but the state's interest in protecting its children would be somewhat vindicated.

VII. Why Religious Exemptions Should Be Repealed

It has always been a strong public policy of this nation to protect children from their own immaturity and from adults who do them harm. As stated in the above sections, the U.S. Supreme Court has never held that the right of an adult to engage in religious acts transcends the state's interest in protecting children from harm. No federal acts require the states to maintain a religious exemption. On the contrary, federal legislation is frequently enacted for the sole purpose of encouraging the states to protect children from situations that threaten their lives and best interests. Still, no mandate exists that prevents states from enacting a religious exemption. This issue has not yet been entertained by the Supreme Court and may never be addressed. Thus, it is vital that states revisit their exemption statutes and assess the legal rationality and morality of retaining such statutes.

Since children are not a constitutionally suspect class,[208] the state need only show that a statute is rationally related to a legitimate state interest.[209] The states can show a legitimate interest in promoting religious diversity and freedom of parents to rear their children in their faith. What they cannot show is that religious exemption statutes actually promote either in a way that is beneficial to the parties or to society at large. If the religious exemptions are repealed, parents will still be entitled to religious freedom and to teach those beliefs to others. The only difference will be that more of their children will grow up to decide for themselves what *they* believe and what they will practice. Almost as important, if all religious exemptions are repealed, religious parents will have the dignity of knowing where they stand with the law. They can still

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Feigley, *How Much* You *Pay to Imprison Citizens*, Prisoners.com, http://www.prisoners.com/costbud.html (last visited Apr. 19, 2012).

> We taxpayers spend more to imprison a person in Pennsylvania than it would cost to send him to the best state college, almost twice as much, as a matter of fact . . . . For about $18,000 he could get a college education. For about $25,000 he could be followed around on the street by a parole agent, one on one. But that wouldn't satisfy the revenge crowd.

Id. Ironically, "the average prisoner costs $4,319 for medical care each year." *Id*.

208. *See generally* Dwyer, *supra* note 174 (providing an outstanding argument for Equal Protection granting children the suspect classification).

209. Id. *at* 1379.

practice faith healing upon their children, but they will not be able to continue the practice until the child is dead without impunity. Repeal of the statutes would leave parents with an unobstructed view of the consequences of their choices.

The only remaining issue is how such reform in the law can be effectuated. The parents who practice faith healing on their children have a vested interest in keeping their own protections. The children who are most imperiled by such statutes have no voice at all. Even advocates such as Dr. Seth Asser and Rita Swann readily admit that their successes have been few, and legislators may have political reasons for not championing such reform.

The only hope for reform is to create an educated electorate. If there is to be reform, it may fall to the bar associations of the fifty states to act. Every bar association funds a certain degree of legal education for the public. Few uses of bar association funds could be more meritorious than using them to educate the public about the dangers these statues pose.

VIII. Conclusion

Religious exemptions, by their nature, violate the strong public policy of the nation in protecting its minor children. Most religious exemptions were enacted in the early 1970s in order to obtain federal funds for the prevention of child abuse. In 1983, Congress stated in its regulations that no state needs a religious exemption to qualify for the federal grants, thus freeing the states to repeal the statutes.

Religious-exemption statutes work mischief in the law whenever they are invoked. If a statute grants anything less than absolute immunity, religious parents are justifiably confused regarding their protections. When such statutes grant religious parents absolute immunity, the state's interest in protecting its children is absolutely abrogated. Whether a state grants partial or absolute immunity, the state finds itself in the position of giving its approval to situations that lead to the unnecessary suffering and deaths of children every year. Every state should repeal its religious exemptions, and every bar association should lead the movement.

IX. APPENDIX: LIST OF STATES RELIGIOUS EXEMPTION STATUTES[210]

210. NAT'L CNTR. FOR PROSECUTION OF CHILD ABUSE, NAT'L DIST. ATT'Y ASSOC., RELIGIOUS EXEMPTION STATUES (Aug. 2010), *available at* http://www.ndaa.org/pdf/Religious%20Exemption%20Statutes%20Aug%202010.pdf (reprinted in its entirety with permission of the NCPCA/NDAA).